

MONTANA PUBLIC DEFENDER COMMISSION
DRAFT MINUTES
State Capitol Building – Room 172
Helena, Montana
October 13, 2006

Call to Order

Chairman Jim Taylor started the meeting of the Montana Public Defender Commission without a quorum at 8:55 a.m. The meeting was officially called to order when a quorum was established at 11:05 a.m. (see below).

Commissioners Present

Betty Bichsel, Edgar; Stephen Nardi, Kalispell; Jennifer Hensley, Butte; Doug Kaercher, Havre; and James Park Taylor, Missoula. Wendy Holton, Helena, was present via conference call from 11:05 until 11:30 a.m.

Commissioners Absent

Dan Donovan, Great Falls; Mike Sherwood, Missoula; Caroline Fleming, Miles City; Tara Veazey, Helena; and Ivan Small, Poplar

Other Interested Parties

Scott Crichton, Executive Director, American Civil Liberties Union (ACLU); Don Kinman, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Pat Gervais, Legislative Fiscal Division; Brent Doig, Office of Budget and Program Planning; Kerry Newcomer, Office of the State Public Defender (OPD) Conflict Coordinator

Approval of August 31, 2006 Minutes

The minutes were reviewed, but action was deferred due to the lack of a quorum.

Communications from Others

Chairman Taylor distributed copies of letters from Senator Shockley (exhibit 1), and to Senator Shockley from Judge Haynes (exhibit 2). Senator Shockley has reconsidered his position and has decided not to introduce legislation that would change the composition of the Public Defender Commission. He was also concerned about the issues raised by Judge Haynes relating to eligibility for public defender services and recoupment protocols.

Chief Randi Hood investigated the case that Judge Haynes referred to, and agrees with the decision made by Regional Deputy Public Defender Ed Sheehy. She will respond to Judge Haynes, and will include copies of the policies and procedures that are in place to determine eligibility for public defender services.

Chief Hood also reported that the Supreme Court ruled on our Petition for Writ of Supervisory Control. The decision was 6-1 in our favor, stating that the courts have no authority to initiate indigency determinations. The decision did not address imposition of attorney fees, which may be the next issue. Commissioner Hensley said that we should be prepared to address an attempt to implement a sliding fee scale during the legislative session.

Reports

Conflict Coordinator Report (Kerry Newcomer)

Mr. Newcomer gave highlights from his written report (exhibit 3). He suggested that OPD emphasize the services that we can provide to contract attorneys. The feedback he has been receiving is that small things (e.g. the \$25 stipend for office costs) are irritants and that some contract attorneys have a sense of not being treated well. He has also heard that some contractors are padding their bills to reclaim their "losses." He suggested improved use of the website to facilitate communications with contract attorneys.

Chairman Taylor had several questions for Mr. Newcomer regarding his monthly billing, backup, and contract attorneys' comfort level with the current conflict management procedure. Mr. Newcomer said that contract attorneys are learning the system and feel as comfortable working with him as they do working with the Central Office, and they find him to be more accessible. He believes that bringing the conflict system in house would slow the response time, and that the contractors would be unhappy to have to learn a new procedure. The Commission can expect Mr. Newcomer's future billing to be closer to the current invoice than the previous one now that the process is working more smoothly. Mr. Newcomer currently has no backup if he is unavailable due to illness or vacation, and Chairman Taylor asked him to give that some additional thought.

The Commission chose to postpone in-depth discussion of changes to the conflict management system due to the small number of members present. Mr. Newcomer said he would be willing to extend his contract another month, through the end of December, and asked the Commission for specific direction on what they would like him to accomplish. Commissioner Hensley requested that he work with Chief Hood and Mr. Murphy to facilitate communication with the contract attorneys and to plan for transition. Chairman Taylor asked that Mr. Newcomer work with Mr. Murphy to develop standardized billing practices, in addition to considering backup options.

Chief Public Defender Report (Chief Randi Hood except as noted)

- *Public Defender System Update*

Chief Hood noted that 105 days into the new system, the number of cases is increasing. Some offices are still in the process of moving into permanent spaces and becoming fully staffed (exhibit 4). Kalispell has a shortage of contract attorneys and a heavy caseload, so they are advertising and hope to hire two attorneys in the near future, in addition to one that will start January 1.

- *Training Coordinator Update*

Twenty of our least experienced attorneys will attend Trial Skills Boot Camp in October. OPD staff will participate in the Montana Board of Crime Control's Juvenile Justice Training October 30-31 in Missoula. A two-day training on involuntary commitments and other mental health issues is scheduled for November 8-9 at Montana State Hospital, and Eric Olson will conduct a State Bar CLE in Glasgow in early December that will be of interest to contract public defenders in the area. Mr. Olson is also working on several DVD presentations, including one on guardianships and conservatorships, and has several Vision Net trainings planned.

- *Chief Appellate Defender Report*
Chief Justice Karla Gray and Chief Appellate Defender Jim Wheelis are both satisfied with how things are going. There are currently 93 cases pending in the Appellate office.
- *Legislative Update*
Our three bills are working their way through the system. The Department of Public Health and Human Services (DPHHS) has drafted a bill relating to fitness to proceed (exhibit 5) requiring that the initial evaluation be conducted in the community, and limiting the amount of time that a defendant can spend at Montana State Hospital following the completion of the evaluation. Other bills of interest are another DPHHS bill providing for involuntary medication of people determined unfit to proceed, and a bill from the Attorney General's office relating to dependent neglect cases. Commissioner Kaercher noted that the counties also have an involuntary commitment bill coming forward to limit the counties' financial responsibility.

The Public Defender Commission Report to the Governor, Legislature and Supreme Court is due December 1. Staff are gathering the data required for the report, as detailed in 47-1-105(9), MCA.

The public defender system is on the agenda for this afternoon's Legislative Finance Committee (LFC) meeting as a "bulldog" report. Bulldogs are assigned to agencies with fiscal issues, and Representative Sinerud has been assigned to OPD. Mr. Freebourn has provided the LFC with information regarding the FTE in excess of the strategic plan, and the projected budgetary shortfall.

- *Collective Bargaining Process (Paula Stoll)*
Paula Stoll reported that negotiations have been productive so far. Tentative agreement has been reached on 14 items, including a grievance arbitration provision. Chairman Taylor shared a concern from Commissioner Sherwood regarding payment of dues, which is a benefit for county attorneys. Ms. Stoll said that the state does have a policy of not reimbursing employees for professional fees unless such reimbursement is part of a collective bargaining agreement. Ms. Stoll expects a proposal from the union regarding this issue soon. The next negotiation session is scheduled for November 17.

Call to Order

The meeting was called to order 11:05 a.m. when Commission Holton joined the meeting by conference call to create a quorum.

Approval of Minutes from the August 31, 2006 Meeting

Commissioner Kaercher moved to approve the minutes as submitted. Commissioner Nardi seconded the motion. The motion carried.

Extension of Conflict Coordinator Contract

Commissioner Nardi moved to extend the contract with Kerry Newcomer as the Conflict Coordinator for an additional month, through the end of December. Commissioner Kaercher seconded. The motion carried.

Administrative Rules

Administrative Rules Hearing Officer Larry Murphy reviewed the previous steps in the rules adoption process, including the public meeting and the acceptance of written comment period. If the Commission accepts the suggested changes and approves the Notice of Adoption (exhibit 6) today, the Notice will be published in Issue 20 of the Administrative Register, and the rules will be effective on October 27, 2006.

Mr. Murphy read the Notice of Adoption, describing the proposed changes, for the benefit of Commissioner Holton. Chairman Taylor and Commissioner Holton had questions regarding the organizational chart. Chief Hood said that the chart comes from the statute, and that contract positions, including the conflict coordinator, do not need to be included. The Appellate Defender office is also statutorily defined as part of the Office of the Public Defender.

Commissioner Nardi moved to approve the Notice of Adoption. Commissioner Kaercher seconded. The motion carried.

Adjourn

With no further business to conduct, Commissioner Nardi moved to adjourn at 11:30. Commissioner Hensley seconded and the motion carried. Commissioner Holton left the meeting.

Reports, continued

- *Contract Officer Update (Larry Murphy)*

Mr. Murphy described the bill review process, and noted that having a part-time assistant has helped streamline the process and enabled him to track unpaid bills. He is still receiving some questionable bills, but his conversations with contractors have remained cordial. Commissioner Taylor asked Mr. Murphy to provide a memo detailing the ways that he is trying to control costs and demonstrate fiscal responsibility in the contracting process.

Mr. Murphy, with Chief Hood's approval, has decided that the \$120 per hour rate for death penalty cases should be reduced to \$60 per hour if the state decides not to pursue the death penalty. The decision regarding whether or not to keep two attorneys on such cases will be referred back to the Regional Deputy Public Defender. Chairman Taylor clarified that the \$120 death penalty rate applies to any case that carries the possibility of the death penalty, including post-conviction relief.

There has been considerable discussion regarding the \$25 per month stipend to contract attorneys for office overhead. Mr. Murphy agrees with one of the Regional Deputy Public Defenders that some attorneys are losing money with the flat rate. However, Mr. Murphy favors some type of cost control, possibly based on caseload. Chairman Taylor suggested that this issue be addressed as part of the billing standards that are being developed.

Public Comment

No public comment was offered at this time.

Reports, continued

- *GANT Chart (Harry Freebourn)*

Mr. Freebourn reviewed the progress of the tasks on the GANT chart (exhibit 7). He noted that other agencies, including the Legislative Fiscal Division, use this tool to track our progress.

- *Regional Community Advisory Councils*

Chief Hood asked for feedback on the draft document creating the first regional public defender advisory council (exhibit 8). She envisions such a council for each of the 11 regions. Chief Hood will incorporate the Commissioners' suggested changes and submit the request to the Governor's office.

- *IT and Case Management System Update (Harry Freebourn)*

The last phase of the initial roll-out is expected in late November when several offices move into their permanent spaces, including Kalispell, Polson and the Butte regional and PD offices.

JustWare, the temporary case management system, has been deployed (to be completed within the month) and training is underway. Thirty-nine county licenses were moved to the state at no cost.

The permanent case management system will go through the state's Request for Proposal (RFP) process. Chief Hood, Mr. Freebourn and Mr. Olson will steer the project management team to define the business requirements and write the RFP.

- *Financial Results (Budget Committee and Harry Freebourn)*

Commissioner Kaercher, chair of the Budget Committee, presented what the Committee hopes will be a meaningful report (exhibit 9) for the Commissioners. The financial report shows that we are under budget so far, but expenses from the early months will catch up and Commissioner Kaercher said it is too soon to identify a trend.

The case count by region report (exhibit 10) is also very preliminary. Some regions are having difficulty entering cases, and the contract attorneys have been asked to notify us when a case has been closed. Staff expect to have an accurate report by late November for inclusion in the report to the Governor, Legislature and Supreme Court.

- *Follow-up from Previous Discussions*

Chief Hood provided the new language to be used in dependent neglect cases instead of "mother." The "person who most recently had care of the child" is the new term.

Chairman Taylor asked about progress in the salary comparisons between public defenders and prosecutors. Mr. Freebourn hopes to have something for the next Commission meeting. He asked the Montana Association of Counties to help with a legislative request to compare county and OPD staffing and costs.

Chief Hood is in the process of implementing a policy regarding performance and proficiency assessments for both FTE and contract attorneys. She will be traveling to Billings with Mr. Olson to do some court observation as part of the evaluations.

Chairman Taylor asked that draft language for an evaluation standard be presented at the next meeting.

Pro Bono Policy

Commissioner Nardi presented a draft OPD Pro Bono Policy (exhibit 11). After reviewing several policies, Commissioner Nardi drafted a policy similar to the one used by the Governor's office, but with an expanded definition of pro bono legal services. Discussion centered on the definitions (section 2), including whether it is appropriate for state employees to do pro bono work for religious organizations. Commissioner Nardi will present a final draft for action at the next Commission meeting.

Conflict Coordinator Discussion

The Commission decided to defer this discussion until the next meeting because so few Commissioners were present.

Standards—General Discussion

Rob Lavine has finished updating the Standards for consistency and formatting. Chairman Taylor will distribute the revised Standards for review prior to the next meeting. Mr. Lavine has resigned his internship, and Chairman Taylor will hire a new intern.

Public Comment

Don Kinman, Executive Director of AFSCME, again shared his sense of urgency regarding CI 97. Mr. Kinman asked that collective bargaining be added to the GANT chart. He said that negotiations so far have been cordial and productive. He doesn't think it is necessary to match the language in the collective bargaining agreement to the grievance standard (just cause/good cause) since the intent is the same.

Scott Crichton, Executive Director of the ACLU, noted the importance of conflict resolution, in regard to both client and provider complaints. The Commission asked that the ACLU provide general feedback regarding complaints they are hearing, and that they advise people to use the grievance process as appropriate. Mr. Crichton said that he will continue to advocate for resources for OPD to do its job.

Old Business/New Business (*Action Items)

There were no additional action items.

Closing

The meeting closed at approximately 2:30 p.m.

Exhibits 1 – 11 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>.